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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP EDWARD LOPEZ, Defendant and Appellant.	G028216 (Super. Ct. No. 99NF1057) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Joel K. Liberson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Robert M. Foster and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Phillip Edward Lopez of lewd and lascivious acts with a child under the age of 14. (Pen. Code, § 288, subd. (a); all further statutory references are to the Penal Code unless otherwise stated.) In a separate proceeding, the court found true

allegations defendant had prior felony convictions under the "One Strike" (§ 667.61, subds. (a)-(j)) and "Three Strikes" laws (§ 667, subd. (b)-(i), 1170.12, subds. (a)-(d)). The jury also found that defendant was sane during the commission of each offense.[1] Defendant received two concurrent terms of 25 years to life.

Defendant contends the trial court erroneously admitted his videotaped interview with police, uncorroborated evidence of other uncharged acts against the victim, and the videotaped interview with the victim. He also contends the court committed prejudicial instructional error by giving CALJIC No. 2.50.01, the standard instruction on evidence of other sexual offenses. We affirm.

I

FACTS

In April 1999, Vivienne L., the mother of the then seven-year-old victim and defendant's sister, reported that defendant had molested her daughter. At the time, defendant lived with the victim, his mother, sister, brother-in-law, and two nephews in the family home.

A social worker conducted a videotaped interview of the victim. The victim reported that defendant had touched her "private," or pubic area, on two occasions when she was six years old and attending kindergarten. On one occasion, defendant took the victim to the side of their house near some trash cans, touched her pubic area, and showed her his penis. On the other occasion, defendant told her to go into his bedroom. Defendant entered the bedroom holding a fabric softener sheet, pulled down the victim's pants and wiped her private with the cloth. On both occasions, the victim's father was at home but in his bedroom. She also mentioned that defendant had told her "nasty stuff" once. While she was sitting between two couches, defendant said, "When I go to the bar, I'm gonna try to get a woman and, um you — you could watch what — how to do it."

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[1] The court conducted a separate sanity phase. However, defendant does not challenge any aspect of this proceeding.

Detectives conducted a videotaped interview after defendant's arrest. The interview lasts approximately one hour and takes place in an interview room at the police department. Initially, a detective told defendant they wanted to talk to him about "some things that have happened that [] shouldn't have happened" with his niece. Following an advisement of his *Miranda*[2] rights, defendant claimed he had no idea why he was arrested and that he had been "wrongfully accused." After approximately 50 minutes of apparent confusion and denials of any wrong doing, defendant admitted that he touched the victim's pubic area and it made him feel "bad" and "ashamed." He further admitted forcing the victim to orally copulate him on one occasion, and licking and kissing her vagina and digitally penetrating her anus and vagina "[q]uite a few times."

In October 1999, defendant was charged with two counts of committing lewd acts with a child under 14 (§ 288, subd. (a)), between August 1, 1997 and June 30, 1998.

At trial, the victim, now an eight-year-old child, testified defendant twice touched her pubic area and restated the facts of each incident as she had described in her earlier interview with the social worker. She also recounted the "nasty talk" incident during which defendant told her he would, "go to the bar and [] get a girl and you see what — what I do." She also described a third occasion that occurred in her grandmother's room while her grandmother was taking a shower, explaining that she had told her mother about it but forgot to mention it during her interview. This time, defendant pulled her pants down and "started tickling [her] in [her] private."

Vivienne testified that defendant moved into her mother's home four months after she and her children had. Her brother had been diagnosed schizophrenic and thought he had quit taking his medication approximately one year before his arrest. She reported that his behavior became "bizarre" when he failed to take his medication

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436

and that he had locked himself in his bedroom for the week prior to his arrest. Occasionally, he looked disheveled. Although they had agreed to some ground rules before he moved in, defendant sometimes violated the rules and had hit one of her sons once or twice. He also got into a physical altercation with her husband after the victim's revelation. Vivienne admitted she and her brother had "always butted heads," but testified that she "still love[d] him."

The prosecution also presented evidence of a prior molestation. In 1989, a then six-year-old male friend of the family stayed overnight in the home. The now 17-year-old recounted an incident in which the defendant, clad in only his underwear, entered the bedroom where he was sleeping and removed his own clothing. Defendant directed the boy to removed his own underwear while defendant masturbated. Defendant grabbed the boy's penis and rubbed his own penis against the boy's anus. The boy reported the incident to his mother the following morning. Defendant admitted the incident to an investigating officer, but stated that it had been mutual masturbation. The parties stipulated that defendant made the following statement under penalty of perjury: " . . . On September 30th, 1989, in Orange County, I sodomized [] and had him masturbate me."

Defendant did not testify in his own defense. His mother testified that her son and Vivienne frequently argued and that her son was mentally ill. Counsel admitted defendant touched the victim with a fabric softener sheet, but argued Vivienne concocted the other reports out of fear and dislike for her brother. The social worker prompted further elaboration of the victim's story during the videotaped interview. Both videotaped interviews were admitted at trial.

II

DISCUSSION

Defendant's pretrial statement

Defendant contends the trial court erroneously admitted his videotaped confession. He contends the record is inadequate to support the trial court's finding of a knowing and intelligent waiver of rights for two reasons: (1) defendant's interviewers did not obtain an express waiver of his *Miranda* rights; and (2) he was incapable of understanding and waiving those rights due to a mental condition or defect. The latter contention, if persuasive, would be dispositive of both issues, but we are not persuaded.

"On appeal, a reviewing court looks at the evidence independently to determine whether a defendant's confession was voluntary, but will uphold the trial court's findings of the circumstances surrounding the confession if supported by substantial evidence. [Citations.] However, if there is conflicting testimony on whether a defendant waived his *Miranda* rights, 'we must accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 383-384.)

At a pretrial hearing, defendant called his mother to testify to his mental state just prior to the arrest. She recounted that her son had been diagnosed as schizophrenic during his first imprisonment. Doctors treated defendant's condition with medication, which she thought proved effective. However, approximately two years before his arrest, defendant discontinued taking his medication. She began to notice her son have "fits of anger" and he would withdraw from the family. He was never delusional, or unable to recognize family members. He was also responsive and able to carry on a conversation, but she described his mental state as "confused." The parties stipulated that the officers made no threats or promises of leniency.

The prosecution also introduced the videotape of the defendant's postarrest interview. On the videotape, defendant appears calm, alert and oriented. He is clean and

appropriately dressed and appears well nourished. There are no visible signs of mental abnormalities. Only defendant's occasional nonresponsive answers suggest he has any mental problems, and some of those answers appear to be deliberately nonresponsive. The court reviewed the videotape of defendant's interview noting, "that the defendant in response to many of the questions either gave extremely delayed answers, and or partially responsive or nonresponsive answers, he went off on tangents here and there, and on occasion in response to questions just maintained silence." Nevertheless, the court concluded, "an observer of the tape would be unable to determine whether this was malingering, whether this was somehow faking confusion or whether or not he, in fact, was in some way confused in general, the majority of the statements show that he understood he was being questioned . . . regarding allegations that [the victim] had made that he molested her and he understood that because initially he denied it several times."

Defendant quotes extensively from the typed transcript of the interview. In a vacuum, defendant's responses seem indicative of some mental instability or illness. However, the whole record, which includes the videotape of the interview, demonstrates defendant voluntarily and knowingly waived his Fifth Amendment rights.

With respect to the court's finding of implied waiver, we conclude the record supports the trial court's ruling.[3] The questioning detective engaged defendant in the following colloquy: "[Detective]: You have the right to remain silent. Do you understand? [¶] [Defendant]: Uh-huh. [¶] [Detective]: Is that a yes? [¶] [Defendant]: Yes. [¶] [Detective]: Okay. [¶] Anything you say may be used against you in court. Do you understand? [¶] [Defendant]: Yes. [¶] [Detective]: Okay. You have the right to a presence [*sic*] of an attorney before and during any questioning. Do you understand? [¶]

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[3] The Attorney General contends defendant waived this issue by failing to raise it below. We agree. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 172.) Nevertheless, we discuss the merits in response to defendant's alternative argument that the failure to object constituted ineffective assistance of counsel. We find no prejudice as a result of counsel's omission.

[Defendant]: Yes. [¶] [Detective]: If you cannot afford an attorney, one will be appointed for you free of charge before any questioning if you want. Do you understand? [¶] [Defendant]: Yes. [¶] [Detective]: Okay. Well with that in mind, do you want to talk to us about what your niece told us happened? I know — [¶] [Defendant]: I have no idea. I have no idea what's going on. [¶] [Detective]: Okay. Well, you were told that you were under arrest; is that correct? [¶] [Defendant]: No. [¶] [Detective]: Okay. Well, you — you were arrested for touching your niece where she shouldn't have been touched. Okay. [¶] And what we'd like to do is we'd like to talk to you about that and, first of all, let me tell you that it could have gone a lot further and I'm glad that it didn't. Okay. [¶] Because I've talked to a whole bunch of people and we've talked before when you've come in and registered every year. [¶] [Defendant]: Uh-huh."

"Although the police officers did not obtain an *express* waiver of defendant's *Miranda* rights, decisions of the United States Supreme Court and of this court have held that such an express waiver is not required where a defendant's actions make clear that a waiver is intended. [Citations.]" (*People v. Whitson* (1998) 17 Cal.4th 229, 250.) Our independent review of the evidence, including the videotape and transcript of the interview introduced during the pretrial, reveal defendant intended to, and did, waive his *Miranda* rights.

Evidentiary errors

Defendant challenges the admission of propensity evidence (Evid. Code, § 1108) and claims the court erred by allowing the jury to hear his confession to other lewd acts not reported by the victim (§ 1101, subd. (a)). We disagree.

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse. [Citation.] Abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of

justice. [Citations.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) No abuse of discretion is apparent from the record.

The court admitted the testimony of the second child victim on the issue of defendant's intent. Defendant now claims his sexual intent toward the victim was not in dispute, and adequately established by other evidence. However, his pretrial not guilty plea put this issue in dispute. Further, the court's considerable discretion extends to deciding how much evidence is enough on any given point. (See *People v. Thornton* (2000) 85 Cal.App.4th 44, 47-48.) We find no error in the court's ruling.

We likewise reject defendant's challenge to the admission of his confession to acts not charged as crimes. Again, this evidence was admitted to prove defendant's intent. It was relevant for this purpose and, although slightly more prejudicial than the charged acts, is also probative to counter defendant's conspiracy theory. Further, the court gave a limiting instruction that directed to the jury to consider this evidence, and the victim's recitation of the nasty talk, for the purpose of determining defendant's intent. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) We find no error.

Nor do we find merit in defendant's corpus delicti argument with respect to defendant's statements. The fact the victim did not corroborate portions of defendant's confession does not mean those statements were inadmissible on the issue of his intent to commit the charged crimes. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173-1174.) Further, the statements were reliable, notwithstanding defendant's claimed mental illness. As noted, defendant appears oriented and alert during the interview and capable of understanding the consequences of his confession. The weight due this evidence was an issue to be determined by the jury, but the court's admission of these statements was not erroneous.

CALJIC No. 2.50.01

The trial court instructed the jury with a modified version the 1999 revision of CALJIC No. 2.50.01, which advised the jury that if it found, by a preponderance of the evidence, that defendant committed the prior offense, it could infer that defendant had a disposition to commit similar offenses, including the charged offenses. Defendant contends the instruction violated his federal due process rights because (1) "it failed to clearly delineate for the jury the use of the lesser standard of proof to establish the prior sexual offense[,]" and (2) it failed to clearly direct the jury on the "use of the inference to be drawn in connection with finding [defendant] guilt of the present crime beyond a reasonable doubt."

The California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, recently held the 1999 version of CALJIC No. No. 2.50.01 correctly states the law. (*Id.* at pp. 1013, 1016.) The *Reliford* court rejected the same challenges to CALJIC No. 2.50.01 raised in the instant case. (See also *People v. Falsetta* (1999) 21 Cal.4th 903.) In accordance with *Reliford*, we do so as well.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P.J.

O'LEARY, J.